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No. 72-102

In the

Supreme Court of the United States

OCTOBER TERM, 1972

AUNT MID, INC.,

Petitioner,

vs.

FJELL-ORANJE LINES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION.

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ADDITIONAL STATUTE INVOLVED

In addition to the Subsections of 28 U.S.C. §46 quoted in petitioner's Petition, Subsections (c) and (d) of 28 U.S.C. §46 are relevant to the issues raised by the Petition. These provide:

> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regu-

lar active service. A court en banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has returned from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

COUNTER QUESTIONS PRESENTED

1. Has 28 U.S.C. §46 (d), which provides that a majority of the number of judges authorized to constitute a division shall constitute a quorum, been construed and utilized to deprive petitioner of equal protection of the law?

2. Does the "clearly erroneous" standard apply to the Findings of Fact entered by the District Court?

3. Were the Findings of Fact entered by the District Court clearly erroneous?

4. Whether previous decisions by the Supreme Court warrant or compel a result other than that reached by the District Court and Court of Appeals for the Seventh Circuit?

COUNTER STATEMENT OF THE CASE

These actions were brought by the petitioner, AUNT MID, INC., against the charterers and other interests connected with two ships, the Ghanian Motor Vessel PRA RIVER and the Norwegian Motor Vessel SIREFJELL, for alleged damages to two cargos of cabbages shipped aboard these vessels. Recovery was sought against the PRA RIVER in the amount of $10,500. Recovery of $6,000

was sought from the SIREFJELL. Forty tons of cabbages were shipped aboard the PRA RIVER; these had been purchased by AUNT MID at the rate of $50 per ton or at a total price of $2,000.00. Twenty tons of cabbages were shipped on the SIREFJELL; these had been purchased by Aunt Mid at a cost of $50 per ton or a total of $1,000.00.

After five full days at trial in the District Court, Judge Austin entered extensive Findings of Fact and Conclusions of Law. These accurately summarize the proceedings in the District Court and are therefore incorporated by respondents as part of their Counter Statement of the Case.*

The thrust of the evidence in the District Court was concisely summarized by the Court in Conclusion of Law 4:

> "The evidence shows that the plaintiff compared the freight rates applicable to ventilated hold and refrigerated stowage; then, against the advise of its agent, Mr. Wolf, and contrary to the usual and customary industry practice, it elected to take the risk of shipping the goods in ventilated hold stowage in order to save $1,560.00 in freight rates. The plaintiff represented to the vessel's agent that the goods would carry in ventilated space for a period of twenty-one days; that they would not was evident from the condition of the goods at discharge. Had the plaintiff elected to ship the goods under refrigeration at approximately but not lower than 32°, the loss would not have occurred. Dr. Ramsey characterized the act of shipping the cabbages without refrigeration as a

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*Even though Aunt Mid contends the United States Court of Appeals erred in its affirmance of these findings and conclusions, such findings and conclusions are not set forth in petitioner's appendix; respondents have therefore set out the Findings of Fact and Conclusions of Law in their appendix.

'gamble' and stated that he would not expect them to hold up.

"The plaintiff gambled when he shipped the cabbages in a ventilated hold rather than under refrigeration. This act, together with the tendency of the goods to spoil at temperatures in excess of 40°, caused the loss."

On Aunt Mid's appeal to the United States Court of Appeals for the Seventh Circuit, the division of the Court assigned to hear the appeal consisted of three judges of that Court, Judges Knoch, Pell and Kerner. After oral argument, Judge Kerner was relieved of his duties. Judges Knoch and Pell unanimously voted to affirm the decision of the District Court.

ARGUMENT

I.

PETITIONER SHOULD NOT BE GRANTED A WRIT OF CERTIORARI ON THE GROUND THAT ONE OF THE THREE JUDGES HEARING ORAL ARGUMENT RESIGNED PRIOR TO THE COURT'S DECISION BEING MADE.

Aunt Mid contends the panel of Judges Knoch, Pell and Kerner was illegally constituted, because after oral arguments were heard, Judge Kerner withdrew from active service and did not participate in the adoption of the Court's opinion. Aunt Mid cites *Allen* v. *Johnson,* 391 F.2d 527, 531 (5th Cir. 1968) as authority for this proposition.

The only question presented to the Court in the *Allen* case was whether a Senior Circuit Judge who sat on a three judge panel in the original hearing of the case, in which no decision was rendered or opinion announced prior to the Court's order setting the case down for rehearing *en banc,* is eligible to participate in the *en banc* determination of that case.

The *Allen* decision did not purport to hold that the continued participation of three judges is necessary to determine a case on appeal.

On October 8, 1971, oral arguments were heard before Judges Knoch, Kerner and Pell who were each then in regular active service on the Court. This constituted the Court. *Bradley Mining Co.* v. *Boice,* 205 F.2d 937 (9th Cir. 1953).

In *Ayrshire Collieries Corporation* v. *United States*, 331 U.S. 132, 138, 67 S.Ct. 1168, 1171 (1947) the Supreme Court compared the three-judge court requirement of the Urgent Deficiencies Act with the provisions of 28 U.S.C. §212 (presently 28 U.S.C. §46). The Court stated:

> "It is significant that this Act makes no provision for a quorum of less than three judges. *Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases . . .*" (Emphasis supplied)

In *United States* v. *Allied Stevedoring Corp.*, 241 F.2d 925 (2nd Cir. 1957) an appeal from a conviction for attempted income tax evasion was determined by Judges Hand and Clark after Judge Frank had died. Judge Learned Hand stated:

> "Section 46(d) of Title 28 U.S.C. provides that 'A majority of the number of judges authorized to constitute a court or division * * * shall constitute a quorum:' *and even when a judge has resigned after argument*, or has died after expressing his dissent, *a remaining majority has jurisdiction to dispose of the appeal . . .*" (Emphasis supplied)

In *United States* v. *Mills*, 317 F.2d 764, 766 (4th Cir. 1963) appellees were not entitled to a rehearing where the appeal was determined by two judges, the third having neither heard oral argument nor participated in subsequent conferences, and having died before the decision was entered.

Aunt Mid further contends that it was prejudiced in that it had to convince all of the judges deciding the case rather than two-thirds of them. Appellees were in the

same position, and therefore, had no prejudicial advantage over the appellant. Further, even had Judge Kerner participated in the decision and supported Aunt Mid's position, the case still would have been affirmed by the majority.

II.

THE FINDINGS OF FACT OF THE DISTRICT COURT ARE TO BE SET ASIDE ONLY IF THEY ARE CLEARLY ERRONEOUS.

Aunt Mid's argument, both in the Court of Appeals and here, is basically that the factual questions in this case were improperly decided in the District Court. However, it recognizes that the review of the Court of Appeals and of this Court is limited in connection with such questions by the clearly erroneous rule. That well-established rule, as stated in *United States* v. *United States Gypsum Co.*, 33 U.S. 364 (1948), is that findings are not to be reversed unless the reviewing court is left with the definite and firm conviction that a mistake has been committed. That standard is applicable to any trial to a Court sitting without a jury, including cases in admiralty. *McAllister* v. *United States*, 348 U.S. 19 (1954).

In its third and fourth arguments, Aunt Mid contends that the findings of the District Court in this case are not entitled to the protection of the clearly erroneous standard. Aunt Mid contends that not only does the clearly erroneous rule not apply to the findings below, but they should be set aside as a "nullity" because the findings were similar to proposed findings drafted by counsel for respondents.

In evaluating Aunt Mid's argument, a review of the pertinent facts is of assistance. At the close of five days of trial, immediately following final argument, Judge Austin summarized his views of the evidence at length, describing the decision of the plaintiff to ship its cabbages in unrefrigerated storage as a "gamble", and announced his intention to rule for the defendants. He then directed counsel for the defendants to draft proposed Findings of Fact and Conclusions of Law. They did so. Subsequently, Judge Austin stated in open court that he had reviewed the Proposed Findings of Fact and Conclusions of Law, that they conformed to his recollection of the evidence and that he was therefore entering them as his findings.

There was no abrogation or delegation by the Court of its fact finding function. To the contrary, the only role defendants' counsel played in the process was purely mechanical in setting forth the evidence and legal authorities in the Proposed Findings of Fact and Conclusions of Law to conform to the previously expressed intentions of the Court.

Aunt Mid also contends that, because most of the evidence was in the form of depositions and exhibits, the clearly erroneous rule does not apply. Aunt Mid's argument fails in two respects. First, most of the significant testimony—and conflicting testimony—was from live witnesses, *i.e.*, Messrs. La Mantia, Wolf, Crijnen, Nusbach, Wilkinson, Captain Sognnes, Captain Dodd, Doctor Ramsey, Doctor Schurtleff; in all, nine of a total of twelve witnesses testified in person. The Court of Appeals stated (App. 6):

> "Here there was conflicting oral testimony, and the District Court obviously did not find all witnesses equally credible. We reject the plaintiff's suggestion,

the effect of which would be for this Court to try the case de novo."

Further, the law since *United States Gypsum* and *McAllister* is well-established that the clearly erroneous rule applies even where the evidence consists largely of deposition testimony and exhibits. *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960); *United States Steel Corporation* v. *Fuhrman*, 407 F.2d 1143 (6th Cir., 1969).

Finally, Aunt Mid argues that the clearly erroneous rule does not apply to mixed questions of law and fact. The case from which Aunt Mid quotes at page 16 of its Petition, *Great Atlantic and Pacific Tea Co.* v. *Brasileiro*, 159 F.2d 661, 665 (2nd Cir., 1947) antedates both *United States Gypsum* and *McAllister* and is just simply not the law. Findings which combine both fact and law are outside the scope of the clearly erroneous standard rule only where there is a question as to the legal principle involved. 5A Moore's Federal Practice ¶ 52.03 [2] at page 2664. Here, petitioner's objections are not to any legal rulings made by the District Court, but to its decision on the facts; as to these, Rule 52(b) of the Federal Rules of Civil Procedure and the clearly erroneous rule apply.

III.

THE FINDINGS OF THE DISTRICT COURT WERE NOT INTERNALLY INCONSISTENT IN ANY SIGNIFICANT MANNER AND THEREFORE WERE NOT CLEARLY ERRONEOUS.

For its fifth argument, Aunt Mid seizes upon isolated language in the Court of Appeals' opinion remarking upon some confusion in the District Court's findings as to whether cabbages spoil at 32, 40 or 45 degrees and then

argues that these remarks demonstrate a recognition of an internal inconsistency in the District Court's findings which compels the conclusion that such findings were clearly erroneous.

In fact, whether the cabbages spoiled at 32, 40 or 45 degrees was, on the facts of this case, not a matter of significance since the likelihood at the outset of the voyage was that the cabbages would be subjected to temperatures far in excess of 45 degrees and this was, in fact, the case. The Court of Appeals correctly confined its decision to matters that had some relevance to the final result and affirmed.

IV.

NO PRIOR DECISION OF THE SUPREME COURT WARRANTS OR COMPELS A DIFFERENT DECISION THAN THAT REACHED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In Petitioner's sixth argument, it contends the Court of Appeals disregarded the Supreme Court's decisions in *Schnell* v. *The Vallescura*, 293 U.S. 296 (1934) and *Missouri & Pacific R.R. Co.* v. *Elmore & Stahl*, 377 U.S. 134 (1964). At page 19 of its Petition, Aunt Mid attempts to mislead the Court by deleting from language quoted from *The Vallescura*, that utterance of the Court applicable to this case. The Court stated:

> "It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of

negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril. [citing cases]" 293 U.S. 203, 305.

The carriers proved the damage was caused by the fault of the shipper in that he shipped perishable cabbages in non-refrigerated cargo holds in order to save freight when he had been advised against this by his partner who purchased the cabbages. Aunt Mid attempted to raise some doubt about the way the carriers stowed the cabbage: conflicting testimony was heard from experts on each side; and, the issue was resolved against Aunt Mid.

Having proved the cause of the damage was the fault of the shipper, an excepted cause under 46 U.S.C. §1304(i), the carriers did not have to go further and disprove every other possibility however improbable, speculative or remote. *The Vallescura,* supra, *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426 (2nd Cir. 1962), *Schroeder Bros.* v. *The Saturnia,* 123 F.Supp. 282, aff'd 226 F.2d 147 (2nd Cir. 1955), *George F. Pettinos, Inc.* v. *American Export Lines,* 68 F.Supp. 759, 761 aff'd 159 F.2d 247 (3rd Cir. 1947).

In *Missouri Pacific R.R. Co.* v. *Elmore & Stahl,* 377 U.S. 134, a jury in Texas found that "inherent vice" was not the sole cause of the decay of a carload of honeydew melons, as pleaded by the rail carrier, thus leaving the inference that the carrier's neglect contributed. In this case the District Court found the cause of the loss to be the fault of the shipper and further found that the cabbages were properly stowed on the PRA RIVER and SIREFJELL and that these vessels were seaworthy in all respects. The cases are inapposite on their facts. In any event, the carriers in this case proved they properly

stowed and carried the cabbages even though this was not their burden once they proved the sole cause of the loss to be the shipper's fault.

The conclusions advanced by Aunt Mid at pages 20, 21 and 22 of its Petition are simply not true. The trial judge who heard the evidence in the utmost detail over a period of five days and had no interest whatever in the outcome is a more reliable arbiter of the evidence than the Petitioner's counsel.

CONCLUSION

This case is concerned with cabbages purchased by plaintiff at a cost of $3,000.00 which plaintiff's president, against expert advice, elected to ship across the Atlantic Ocean in April and May without refrigeration. The case took a week to try in the District Court. The District Court's decision was then thoroughly and conscientiously reviewed by the Court of Appeals for the Seventh Circuit.

The questions presented, which are essentially factual and relatively unimportant, have already been passed upon by two lower courts and correctly decided. It is respectfully submitted the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for the Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 68 C 1796) * *
* * (Caption—No. 68 C 1797) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These two consolidated cases came on regularly for trial on May 27, 1970, before the Court sitting without jury, Zeamore A. Ader and David L. Ader appeared as counsel for the plaintiff and Michael A. Snyder and Jonathan G. Bunge appeared as counsel for the defendants in cases 68 C 1796 and 68 C 1797, respectively.

With the exception of portions of the depositions of Helge Vikan, Chief Officer of the M/V SIREFJELL, and Johannes J. F. deJong, a supercargo who attended the loading of the M/V PRA RIVER, all the evidence was received through the testimony of witnesses appearing in person and such exhibits as were offered by the parties.

The Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, and the Court, being fully advised in the premises, makes its findings of fact as follows:

FINDINGS OF FACT

The Court finds:

1. These are maritime and civil causes of action to recover money damages for the spoilage of two shipments of cabbages.

2. The plaintiff in each of the cases, Aunt Mid., Inc., is an Illinois corporation with its offices and principal place of business in Chicago, Illinois. The plaintiff is in

the business of preparing and packaging fresh vegetables for domestic consumption.

3. Fjell-Oranje Lines is an operating trade name for a joint ocean shipping service comprised of Fjell-Line of Oslo, Norway and Oranje Lijn (Maatschappij Zee Transport) N.V. of Rotterdam, The Netherlands. Fjell-Oranje was at all material times a time charterer of the Norwegian Motor Vessel SIREFJELL and Oranje Lijn was at all material times a time charterer of the Ghanian Motor Vessel PRA RIVER.

4. Great Lakes Overseas, Inc. was at all material times the agent in Chicago, Illinois, for the Fjell-Oranje Lines. Although named a party defendant in these actions, this defendant was neither served with process nor did it appear.

5. In the fall of 1966 the plaintiff entered into an agreement with Suffolk Farms Packing Co. of Chelsea, Massachusetts to purchase cabbages of the Danish variety from producers in The Netherlands. The cabbages were to be used in the manufacture of cole slaw which was to be sold to various super market chains. The president of Suffolk Farms was Arnold Wolf. Mr. Wolf was also a principal in the firm of Wolf & Wolf N.V., Amsterdam, The Netherlands.

6. Mr. Arnold Wolf of Wolf & Wolf N.V., as the agent of the plaintiff, purchased 100 net tons of cabbages for the plaintiff in Holland in October of 1966. These cabbages were part of a total of 400 tons purchased by Wolf & Wolf N.V., as agent, from a farmer and a produce dealer. The cabbages were stored in Holland over the Winter of 1966-1967.

7. In the Spring of 1967, the plaintiff through its president, Mr. Russel LaMantia, explored the costs of packaging the cabbages and shipping them from Holland to Chicago. He was advised by Arnold Wolf that a saving of forty cents per fifty pounds ($16.00 per ton) could be made by shipping the cabbages in mesh bags rather than

crates (D. Ex. 2). Mr. Wolf also advised Mr. LaMantia that he had experienced more shrinkage in bags than crates (D. Ex. 2) and that bruising per unit had been noted to be four per cent in crates as opposed to nine per cent in bags (D. Ex. 6).

8. In exploring the cost of shipping the cabbages from Holland to Chicago, Mr. LaMantia contacted Great Lakes Overseas and was advised that the cost of shipping the cabbages under refrigeration would be $81.00 per metric ton and the cost of shipment in ventilated hold storage without refrigeration would be $55.00 per metric ton (D. Ex. 1).

9. On March 27, 1967, Mr. Arnold Wolf wrote Mr. LaMantia stating that:

> "Wolf & Wolf is of the opinion that cabbage to the the Great Lakes with a voyage of three weeks should be shipped under refrigeration . . ."
> "At any rate, you should bear in mind that there is a certain risk involved, while under refrigeration you will practically have no risk. The decision and responsibility is of course entirely yours." (D. Ex. 7).

10. Notwithstanding the advice of Arnold Wolf, who testified on behalf of the plaintiff as to having acquired broad experience in the exportation and importation of fresh produce, including cabbages, over a period of thirty years, Mr. LaMantia elected to package the cabbages in mesh bags rather than crates and to ship them in ventilated hold stowage rather than under refrigeration. The savings effected by the choice to ship the 100 tons in ventilated stowage rather than under refrigeration resulted in a saving to the plaintiff of $26.00 per ton or one and three tenths of a cent per pound of cabbage.

11. Great Lakes Overseas, Inc. requested confirmation from the plaintiff that the cabbage would survive such a voyage to the Great Lakes. On March 21, 1967, Mr. LaMantia wrote Great Lakes Overseas, Inc. and advised

them that the cabbage would carry in a ventilated hold for a period of 21 days, and confirmed his understanding that the temperature would not be below 32 degrees Fahrenheit (P. Ex. 1-A)

12. On April 15, 1967, forty net tons of the cabbages were delivered to the M/V PRA RIVER at Rotterdam and Fjell-Oranje Lines issued its bill of lading No. 23. that same day. The bill of lading recited that the goods were received in "apparent good order and condition" and was claused "HOLD STOWAGE" (P. Ex. 6).

13. On April 21, 1967, twenty net tons of cabbages were delivered to the M/V SIREFJELL at Rotterdam and Fjell-Oranje Lines issued its bill of lading No. 23. The bill of lading recited the goods were received in "apparent good order and condition" and was also claused "HOLD STOWAGE" (P. Ex. 2).

14. The forty tons of cabbages shipped on the M/V PRA RIVER were packed in 1,800 mesh bags. 492 of these bags were stowed in No. 3 lower hold and 1,308 were stowed in No. 4 lower hold. In each hold the bags were stowed on top of palletized baler twine. There were sheets of one inch thick plywood separating the cabbages from the baler twine and from the structural parts of the vessel. Captain Ragnar Sognnes, an experienced marine surveyor, and Captain Harry J. Crijnen, a licensed master, former chief officer and cargo superintendent, testified on behalf of the defendants. Both testified that the bags of cabbages were loosely stowed approximately five bags in height and that nothing was stowed on top of the cabbages. In their opinions the cabbages were stowed as well as they could have been. They were well below the weather deck which is exposed to the sun, and they were stowed in line with the flow of air through the ventilation ducts in each hold. Mr. LaMantia, who had seen the cabbages in stow, admitted on cross examination that they were "neatly stacked." The Court accepts the testimony of Captain Sognnes and Captain Crijnen that the 1,800 bags of cabbages were well and properly stowed in the customary manner aboard the PRA RIVER.

15. The ship's ventilation system was operated in the presence of Captain Sognnes who found the system to be adequate and providing a good draft of outside air.

16. The cabbages were discharged from the M/V PRA RIVER May 8 and 9, 1967. At this time the cabbages were badly decayed, having numerous black spots on their outer leaves and having a rotten odor. Mr. La Mantia requested an inspection by the United States Department of Agriculture. A certificate of condition was issued by the Department of Agriculture inspector stating that "all heads showed decay, Bacterial Soft Rot, in all stages mostly advanced, affecting two to four head leaves and some entire heads." He found the pulp temperature of the various cabbages ranged from 51 degrees to 54 degrees Fahrenheit on May 9, 1967 (D. Ex. 9). The air temperature in Chicago on that day ranged between 41 and 63 degrees with an average of 52 (D. Ex. 18).

17. The twenty tons of cabbages shipped on board the SIREFJELL were packed in 900 mesh bags and were stowed in the No. 5 refrigeration or "reefer" compartment of the vessel. This compartment was constructed in such a way that goods could be carried either using forced draft ventilation or under refrigeration. Captain Sognnes testified that the bags of cabbages were loosely stowed approximately five bags in height allowing adequate ventilation. Captain Sognnes also stated the cabbages were neatly stacked and that nothing was stowed on top of them. In his opinion, the stowage of the cabbages was "good." The Court accepts the testimony of Captain Sognnes that the 900 bags of cabbages were well and properly stowed in the customary manner aboard the SIREFJELL.

18. The SIREFJELL left Rotterdam on April 21, 1968. The ventilation equipment in the No. 5 "reefer" compartment was used until the vessel had been at sea for seven days. At this time the Captain, Chief Officer and Chief Engineer smelled the odor of spoiling cabbages coming from the ventilators leading to the No. 5 "reefer" com-

partment. Refrigeration was then applied and continued throughout the remainder of the voyage to Chicago, except for periods of a few hours in Montreal and Cleveland. A temperature of between 5 and 8 degrees Centigrade (40 to 46 degrees Fahrenheit) was maintained.

19. The ventilation available in the No. 5 "reefer" compartment was described in detail by the Chief Officer of the SIREFJELL, Helge Vikan, and provided a continuous supply of circulating fresh air. The ship's ventilation system was also operated in the presence of Captain Sognnes who found the system to be good and providing a good draft of outside air. The Court finds that the ventilation provided the cabbages was in all respects proper and of the usual and customary type provided goods carried in ventilated hold storage.

20. The SIREFJELL arrived in Chicago on May 17, 1967. The cabbages in the No. 5 "reefer" compartment were badly decayed and discolored with black spots. The cabbages from the SIREFJELL were discharged the following day, on May 18, 1967, and at that time were inspected by an inspector from the United States Department of Agriculture. The cabbages were decayed and suffering from "Bacterial Soft Rot and Watery Soft Rot in all stages, mostly advanced affecting from 1 to 4 outer leaves or the butt" (D. Ex. 8). The inspector also found the temperature control system of the SIREFJELL was operable. The pulp temperatures of the cabbages taken from the SIREFJELL on May 18, 1967 ranged from 60 to 65 degrees Fahrenheit while the air temperature was in excess of 80 degrees Fahrenheit.

21. Both the PRA RIVER and SIREFJELL shipments were condemned by inspectors of the Pure Food and Drug Administration and destroyed.

22. Several photographs were taken of the cabbages discharged from each vessel by both Captain Sognnes (D. Exs. 10 to 13) and Joseph T. Wilkinson of Toplis &

Harding, Inc., who surveyed on behalf of the plaintiff (P. Exs. 23 to 32). When shown United States Department of Agriculture Handbook No. 184, Market Diseases of Cabbages, Cauliflower, Turnips, Cucumbers, Melons and Related Crops (D. Ex. 17), Mr. Wilkinson identified photograph (B) appearing on Plate 1 as being most typical of the condition he observed. This photograph depicted a head of cabbage affected with alternaria rot. Captain Sognnes took a close-up photograph of a head of cabbage which he identified as being representative of the average condition of the PRA RIVER cabbages (D. Ex. 20). Referring to this photograph, Malcolm C. Schurtleff, PhD., an expert plant pathologist who testified for the plaintiff on rebuttal stated on direct examination that the cabbage depicted was affected with alternaria rot.

23. The unrebutted testimony of Glen B. Ramsey, PhD., an expert plant pathologist who testified on behalf of the defense, was that alternaria rot, bacterial soft rot and watery soft rot are caused by bacterial organisms found in the soil or in the atmosphere, and that cabbages affected by these conditions in their early stages could easily pass by the ordinary observer without being noticed.

24. Dr. Schurtleff testified that bacterial soft rot is caused by a parasitic bacteria which enters plants which have been previously diseased, cut, bruised or otherwise injured.

25. Dr. Schurtleff testified that the pulp temperatures of cabbages not subjected to ventilation would generally exceed that of the outside air by 15 to 20 degrees, and that pulp temperatures of rotting cabbages in excess of 100 degrees was not uncommon. The cabbages were discharged in Chicago with pulp temperatures no greater than that of the outside air. In the case of the SIREFJELL, the temperatures on the day following discharge were twenty degrees less than that of the outside air, as refrigeration had been applied to these cabbages when their rotting odor was first noted.

26. From the Pilot Chart of North Atlantic Ocean for April (D. Ex. 22), Captain Sognnes traced the route to be followed from Rotterdam to the Gulf of St. Lawrence and showed the average April temperatures along that route range between 32 and 54 degrees. Captain Gabriel V. Dodd, testifying as an expert on behalf of the plaintiff, stated on cross examination that the temperatures to be expected by the M/V SIREFJELL on her crossing would reach 65 degrees.

27. Both expert plant pathologists agreed that the bacteria causing decay would remain dormant at 32 degrees and that up to 40 degrees development would be retarded. Above 40 degrees, however, the bacteria causing decay develop rapidly and reproduce on a geometric progression at a rate directly proportionate to the increase in temperature. Captain Dodd, Dr. Ramsey and Dr. Schurtleff testified that the usual and customary industry practice is that, to prevent the development of bacteria causing decay, shipments to distant markets are refrigerated to at least 40-45 degrees Fahrenheit during transit.

28. The Court accepts the foregoing testimony and finds that the cause of the decay of the cabbages was their infection with bacteria causing alternaria rot, bacterial soft rot and watery soft rot prior to shipment aboard the M/V PRA RIVER and M/V SIREFJELL and their inherent quality to spoil and decay at temperatures above 40 degrees Fahrenheit due to the growth of these bacteria, and that these causes are sufficient to account for the loss. The Court further finds that these bacteria were either dormant or in an early stage of development when loaded aboard these vessels so that the presence of the infection was not apparent to the defendant carriers.

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this Court to be true in all respects.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and of the parties to this action.

2. The law applicable to this case is to be found in the Carriage of Goods By Sea Act, approved April 16, 1936, 46 U.S.C. §§1300-1315.

3. This Act affords certain enumerated defenses to the carrier, the following of which have been pleaded by each of the defendants:

> "1304(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . .
>
> (i) Act or omission of the shipper or owner of the goods, his agent or representative; . . .
>
> (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods . . ."

These defenses together with those of insufficiency of packing (§ 1304(2) (N)) and insufficiency or inadequacy of marks (§ 1304(2) (O)) are all related to the fault of the shipper or defects in the cargo and arise out of considerations of simple justice. The Law of Admiralty, Gilmore and Black, 1957, p. 145.

4. Concerning the first of these defenses, that the damage resulted from an "act or omission of the shipper," the evidence shows that the plaintiff compared the freight rates applicable to ventilated hold and refrigerated stowage; then, against the advice of its agent, Mr. Wolf, and contrary to the usual and customary industry practice, it elected to take the risk of shipping the goods in ventilated hold stowage in order to save $1,560.00 in freight rates. The plaintiff represented to the vessel's agent that the goods would carry in ventilated space for a period of twenty-one days; that they would not was evident from the condition of the goods at discharge. Had the plaintiff elected to ship the goods under refrigeration at ap-

proximately, but not lower than, 32 degrees, the loss would not have occurred. Dr. Ramsey characterized the act of shipping the cabbages without refrigeration as a "gamble" and stated that he "would not expect them to hold up."

The plaintiff gambled when he shipped the cabbages in a ventilated hold rather than under refrigeration. This act, together with the tendency of the goods to spoil at temperatures in excess of 40 degrees, caused the loss. The temperatures to which the cabbages were exposed in the course of ocean transit must be deemed the risk of the shipper since it elected not to contract for refrigeration in transit and the shipper must bear the consequences of its decision. Commodity Service Corp. v. Boston Insurance Co., 1964 A.M.C. 926, 939 (S.D.N.Y. 1964); affirmed sub nom. Commodity Service Corp. v. Hamburg-American Line, 354 F.2d 234 (2d Cir. 1965). The carriers were under no obligation to do other than to see that the goods received the usual and customary degree of care afforded such goods in the stowage and carriage requested by the shipper. The shipping of the cabbages in a ventilated hold constituted an act of omission of the shipper or owner of the goods within the meaning of 46 U.S.C. § 1304(2) (i).

5. The defendants' bills of lading reciting receipt of the cabbages "in apparent good order and condition" do not establish the good order of this cargo since they refer only to the external condition of the cargo, and do not refer to the possibility of inherent defects such as the bacteria and organisms which caused the decay. Commodity Service Corp. v. Boston Insurance Co., supra; Thomas Roberts & Co. v. Calmar S.S. Co., 1945 A.M.C. 375, 59 F. Supp. 203, 207 (E.D. Pa. 1945); Niel Maersk, 1937 A.M.C. 975, 91 F. 2d 932 (2 Cir. 1937), cert. denied 302 U.S. 753; Albers Bros. Milling Co. v. Hauptman, 1938 A.M.C. 752, 95 F.2d 286 (9 Cir. 1938).

6. The burden of proof lies with the plaintiff to show that the goods were in fit internal order and condition to survive the voyage for which they were booked. Commodity Service Corp. v. Boston Insurance Co., and Hamburg-

American Line, supra; American Tobacco Co. v. Katingo Hadjipatera, 81 F. Supp. 438, 446 (S.D.N.Y. 1948), modified and affirmed as modified, 194 F. 2d 449, cert. denied 343 U.S. 978 (1952); Hecht, Levis & Kahn, Inc. v. The S.S. President Buchanan, 1956 A.M.C. 1970, 236 F. 2d 627 (2d Cir. 1956); Gothic Star, 1933 A.M.C. 1048, 4 F. Supp. 240 (S.D.N.Y. 1933). There was no credible evidence tending to prove the cabbages were fit to survive a voyage where temperatures in excess of 40 degrees were to be expected and the overwhelming evidence is to the contrary.

7. The cabbages were properly stowed and carried on both the PRA RIVER and SIREFJELL and these vessels were seaworthy in all respects.

8. The complaints are to be dismissed with prejudice and with costs to the defendants.

/s/ R. B. Austin
United States District Judge

DATED: June 24, 1970

CERTIORARI DENIED